IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 20TH NOVEMBER 2007 / 29TH KARTHIKA 1929

CRL.A.No. 583 of 2005()

SC.207/1998 ON THE FILE OF THE ADDL. SESSIONS JUDGE(FAST TRACK COURT-I), THIRUVANANTHAPURAM.

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APPELLANT: 2ND ACCUSED:

CHANDRANAND @ HARI, S/O. RAJENDRAN,
RAJANANDAN, T.C.13/2090(1), KANNAMMOOLA WARD,
VANCHIYOOR VILLAGE.

BY ADV. SRI.K.GOPALAKRISHNA KURUP

RESPONDENT: COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.C.M.KAMMAPPU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 23/7/2007, ALONG WITH CRA NO. 598 OF 2005 AND CRA NO. 109 OF 2006 THE COURT ON 20-11-2007 DELIVERED THE FOLLOWING:

Crl.M.A.No. 4001/2005 in Crl.A.No.583 /2005

Dismissed.

20th November, 2007

Sd/-K. Thankappan,
Judge.

mn.

K.Thankappan,J.

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Crl.L.P.No. /2006

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Judgment

-12-2006

K. Thankappan, J.

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Crl. A. Nos. 583 & 598 of 2005
&
109 of 2006

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JUDGMENT

Accused nine in numbers in S.C.No.207/1998 on the file of the Court of the Addl. Sessions Judge (Fast Track Court-I), Thiruvananthapuram were charge-sheeted for the offence punishable under sections 457, 366, 323, 324, 506(II), 376(2)(g) and 120(B) read with section 34 IPC. Accused 1, 5 and 7 were reported dead and hence charges against them were abated and the remaining accused were tried. The prosecution case against the accused is that accused 1 to 9 entered into a criminal conspiracy to commit rape on PW1 on kidnapping her from her house and thereafter they in furtherance of their common intention of committing rape on her on 21-5-1996 at 8.30 P.M. accused 1 to 3 criminally trespassed into the house of PW1 and 2nd accused awakened her, who was sleeping. and closed her mouth with a handkerchief and accused 1 to 3 forcibly took her out of

the house and forcibly took her in an autorickshaw bearing registration No. KL 01 F 4695 and thereafter accused 2 and 3 also entered into the autorickshaw, being driven by the 9th accused. Thereafter 1st accused entered into another autorickshaw bearing registration No. KCV 310, being driven by 8th accused, and the two autorickshaws were driven towards a place called Kunnukuzhy and thereafter the autorickshaw driven by the 8th accused was parked on the southern side of the road of the slaughter house building of the City Corporation, Thiruvananthapuram situated in Kunnukuzhy Ward, Vanchiyoor Village. It is also alleged that the autorickshaw driven by the 9th accused in which 2nd and 3rd accused travelled was taken inside the slaughter house compound and thereafter PW1 was forcibly taken to the front room of the western block of slaughter house building and then 2nd and 3rd accused beat her and fisted her on the different parts of her body, 3rd accused beat her with a dangerous stick on her buttock portion and then 3rd accused criminally intimidated her stating that she would be killed if she would tell about the incident to others and thus causing her in fear of death and the 1st accused criminally intimidated

her by flashing a camera without film pretending that her naked photos were taken and thereafter accused Nos.2 to 7 and 9 committed rape on her one after another and thereby committed the offences punishable under the aforesaid sections. To prove the charge against the accused, PWs.1 to 24 were examined and Exts.P1 to P43 and MOs. I to VIII were marked. When the accused were questioned under section 313 Cr.P.C., they denied the incriminating circumstances brought by the prosecution against them. On the side of the defence, Exts.D1 to D7 were marked. However, on considering the entire evidence, the trial court found accused Nos. 2, 3, 4 and 6 are guilty of offences punishable under sections 448, 366, 506(I) and 376(2)(g) read with section 34 IPC and they were convicted thereunder and sentenced to undergo rigorous imprisonment for three months each under section 448 read with section 34 IPC, sentenced to undergo rigorous imprisonment for two years each and to pay a fine of Rs.5,000/- each and in default to undergo rigorous imprisonment for three months each under section 366 read with section 34 IPC, sentenced to undergo rigorous imprisonment for three months each under section 506(I) read

with section 34 IPC, sentenced to undergo rigorous imprisonment for seven years each and to pay a fine of Rs.15,000/- each and in default to undergo rigorous imprisonment for two years each under section 376 (2)(g) read with section 34 IPC. The trial court ordered that substantive sentences should run concurrently. The trial court also found that accused 8 and 9 were not guilty to offences punishable under sections 457, 366, 323, 324 and 506(II) read with section 34 IPC and they were acquitted of the said offences. Crl.A.Nos.583/2005 has been filed by the 1st accused, Crl.A.No.598/2005 has been filed by accused 2 to 4 and Crl.A.No.109/2006 has been filed by the 2nd accused through the jail authorities in S.C.No.207/1998 on the file of the Court of the Addl. Sessions Judge (Fast Track Court-I), Thiruvananthapuram for setting aside the impugned judgment of the trial court.

2. Heard the learned counsel for the accused/appellants and heard the learned Public Prosecutor.

3. The judgment under appeals is challenged on the following grounds. Firstly, it is contended that the trial court has committed serious error in accepting the evidence of PW1, as her evidence is

highly improbable and unbelievable in the facts and circumstances of the case. Secondly it is contended that the trial court ought not have accepted the occurrence witnesses as they are not supporting the prosecution case as such and they deviated from their earlier versions. Thirdly it is contended that there was a delay of three days in filing Ext.P1 statement before the police and hence the trial court ought to have rejected the evidence of PW1. Fourthly, it is contended that the trial court ought not have accepted the medical evidence adduced by the prosecution, as there is no evidence to prove that there is any forcible intercourse. Lastly, it is contended that the trial court has committed serious error in finding that the appellant guilty under sections 366 and 376(2)(g)read with section 34 IPC, as there is no evidence to prove that the appellants have a common intention to commit the offences as alleged by the prosecution.

4. In the light of the contentions raised by the learned counsel for the appellants, this Court has to analyze the evidence adduced by the prosecution and to find whether the conclusions arrived at by the

trial court are justifiable or not?

5. The specific charge against the appellants is that all the accused conspired together to commit rape on PW1 after kidnapping her from her house and accused 1 to 3 criminally trespassed into the house of PW1 and 2nd accused closed her mouth with a handkerchief and accused 1 to 3 forcibly taken her out of the house and forcibly taken her in an autorickshaw and the autorickshaw was taken inside the slaughter house in Kunukuzhy and thereafter PW1 was forcibly taken to the front room of the western block of slaughter house and then accused 2 and 3 beat her and fisted her on the various parts of her body, the 3rd accused beat her with a dangerous stick on her buttock portion and then the 3rd accused criminally intimidated her stating that she would be killed, if she would tell about the incident to others causing her fear of death and then the 1st accused criminally intimidated her by flashing a camera without film pretending that the naked photos of PW1 were taken and thereafter accused 2 to 7 and 9 committed rape on her one after another. The further case of the prosecution is that after the commission of the offence PW1 was taken to her house in an

autorickshaw by the accused and they left the place. After the incident PW1 on 23-5-1906 at 8 p.m. went to the Valiyathura Police Station and lodged Ext.P1 statement before PW21 the then Sub Inspector of Police, Valiyathura Police Station. PW21 on the basis of Ext.P1 statement registered a case as Crime No.137/96 against accused 1 to 6 and others for offence punishable under sections 363, 376 and 354 IPC. PW21 sent PW1 to the hospital for medical examination. PW1 was examined by PW19 and issued Ext.P27 certificate. PW23 the then S.I. of Police, Poonthura Police Station took up the investigation of the case and questioned the witnesses. PW22 the then C.I. of Police, Poonthura took up the further investigation and PW25 filed charge before the court. As per the final report Extt.P42 it is alleged that the appellants and other accused had committed offences punishable under sections 457, 366, 323, 324, 506(II), 378(2)(g) and 120(B) read with section 34 IPC. To prove the charge against the appellant the trial court has mainly relied on the evidence of PWs.1 to 4, 13 to 19, 21 to 24. Pws.21 to 24 are the official witnesses.

6.As per Ext.P42 final charge, on 21-5-1996 at 8.30 p.m. accused 1 to 3 criminally trespassed into the house of PW1 and 2nd accused closed her mouth with a handkerchief and accused 1 to 3 forcibly taken her in an autorickshaw and thereafter the autorickshaw was taken inside the slaughter house in Kunukuzhy and thereafter PW1 was forcibly taken to the front room of the western block of slaughter house and then accused 2 and 3 beat her and fisted her on the various parts of her body, the 3rd accused beat her with a dangerous stick on her buttock portion and then the 3rd accused criminally intimidated her stating that she would be killed if she would tell about the incident to others causing her fear of death and then the 1st accused criminally intimidated her by flashing a camera without film pretending that the naked photos of PW1 were taken and thereafter accused 2 to 7 and 9 committed rape on her one after another.

7. In her evidence PW1 stated that she was residing at Puthuval House in Chieriyathura in the Valiyathura Ward of Muthathara Village. On 21-5-1996 in the night while she was sleeping, the 2nd accused awakened her and requested her to go with him outside the house.

When she refused, he closed her mouth with a handkerchief and accused 1 to 3 forcibly took her out of the house and forcibly took her in an autorickshaw. Thereafter, the autorickshaw was taken along the Kallumoodu road and then the autorickshaw stopped near a big wall. She further deposed that in the second autorickshaw the 6th accused and deceased Ravi were travelling. At that time an aged man opened the gate. Thereafter she was forcibly taken to the front room of the western block of slaughter house and they asked to remove the dress. When she refused, they beat her and fisted her on the various parts of her body. She was forcibly laid on the floor and accused Hari committed rape on her and thereafter 1st accused committed rape on her. Then the 3rd accused threatened her stating that she would be killed if she would tell about the incident to others and then deceased Ravi criminally intimidated her by flashing a camera without film pretending that the naked photos of PW1 were taken. Further evidence of this witness is that thereafter they committed rape on her one after another. She identified accused Nos. 3, 4, 6 and 9. She further stated that after the incident she was taken to her house in an autorickshaw driven

by the 1st accused and when they reached near the house, they left the place. She also stated that on the next day accused 3 and 4 came to her house and they laughed at her. Further evidence of this witness is that on 23-5-1996 at 6 P.M. she went to the police station and reported the matter to PW21. PW21 sent her to the hospital and in the hospital she was examined by PW19 doctor. PW19 issued Ext.P27 certificate. PW19 took vaginal smear and swab and sent for chemical analysis.

8. PW2 was examined to prove the ownership of autorickshaw bearing registration No. KL 01 F 4695 and also to prove that the autorickshaw was driven by the 9th accused. PWs.3 and 4 were examined as occurrence witnesses. They were declared hostile to the prosecution. PW5 was examined to prove that autorickshaw bearing registration No. KCV 310 belongs to him and also to prove that during the relevant time 8th accused was driving the autorickshaw. PWs.7 to 12 proved Exts.P13, 14, 15, P36 and P40. PW13 Chief Chemical Examiner issued Ext.P17 certificate. PWs.14 to 16 were examined to prove the potency of some of the accused including 2nd accused. PW17 was the Judicial Magistrate of the First Class IV (Mobile Court),

Thiruvananthapuram who recorded Ext.P4 statement of Maniyan under section 164 Code of Criminal Procedure. PW18 was the Assistant Director of Biology Division in FSL Trivandrum. He issued Ext.P26 certificate. PW20 was examined to prove the potency of the 9th accused. He issued Ext.P28 certificate. The trial court after considering the evidence of Pws.1,2,19,20 to 24 found that there was common intention on the part of the accused persons and it was in furtherance of their common intention they had trespassed into the room of the house of PW1 and kidnapped her and committed gang rape on her after criminally intimidating her and hence the prosecution had fully succeeded in proving the charge against the accused.

9. The trial court while analyzing the evidence of PW1 found that there were some minor contradictions and embellishments in the evidence of PW1. It has to be noted that evidence of PW1 would show that on 21-5-1996 at 8.30 p.m. accused 1 to 3 criminally trespassed into the house of PW1 and 2nd accused closed her mouth with a handkerchief and accused 1 to 3 forcibly taken her in an autorickshaw and thereafter the autorickshaw was taken inside the slaughter house

and thereafter the accused committed rape on her one after another. In this context, the evidence of PW23 who prepared Ext.P30 scene mahazar would show that there are so many houses very close to the house of PW1. There is a pathway to the public road from the house of PW1 and the house of PW1 is situated in an open place. PW23 had not questioned the neighbours at the time of preparing Ext.P30 mahazar. Reading of Ext.P30 would also show that a distance of 25 to 30 metres to reach the main road where the autorickshaw was parked. Ext.P30 would further show that there are many houses within the distance of 25 to 30 metres from the house of PW1. If the evidence of PW1 is taken into consideration, it is not possible to believe that she was forcibly taken from her house and dragged to a distance of 25 to 30 metres and forcibly taken in an autorickshaw without attention of the public of the locality. Further it can be seen that PW1 had seen the accused persons prior to the occurrence when they used to visit the house of the 1st accused. If she was forcibly taken by accused 1 to 3, she ought to have make an attempt to get the attention of the public of the locality. Ext.12 scene mahazar and the evidence of PWs.6 and 23

would show that there are many houses and shops very close to the slaughter house. If that be so, PW1 ought to have made an attempt to get the attention of the public. The evidence of PW3 who was examined as an occurrence witness is also relevant. PW3 was working as the watchman of the slaughter house during the relevant time. He stated that he was on duty at the slaughter house on 21-5-1996 and he was questioned by the police in connection with the incident and he was kept in the police station for more than 12 days. Thereafter he was taken to the Judicial Magistrate and he had given a statement. Though he admitted his signature in the statement, he sated that he had given the statement as directed by the police. He was declared hostile to the prosecution. The evidence of PW1 regarding the alleged abduction made by the accused is not clearly established by cogent and reliable evidence. In this context the evidence of PW4 who was examined as occurrence witness is also relevant. The prosecution case is that after commission of offence, PW1 was taken to her house in an autorickshaw in which PW4 was also travelling. Accused 1 to 6 were also accompanied her. She admitted the fact that PW4 was a neighbor

of her. But she had not informed him about the incident. It is interesting to be noted that on the next day accused 3 and 4 came to her house and laughed at her, which might have provoked her to go to the police station and file the complaint. In this context it has to be noted that the trial court found that there were some minor contradictions and embellishments in her evidence. But the trial court had considered that it was subjected to lengthy and severe cross-examination by the defence counsel. The trial court came to the conclusion that there was no evidence to prove that none of the appellants had committed offences punishable under section 457, 323, 324, 506(II) or even 354 read with section 34 IPC, as the prosecution has failed to prove the above charge. In the above circumstances, the evidence of PW1 was that she was forcibly taken from her house to the slaughter house and committed rape on her one after another has to be considered very cautiously.

10. In her evidence PW1 stated that she was brutally attacked by the accused and each and every parts of her body were pinched by them. In Ext.P27 it is stated that tenderness present on her upper chest

and upper inter scapular region. It is further stated that no external injuries were found on the breast and lips and no injuries were found on external genitallia. It has come out in evidence that she was accused in certain cases including a murder case. The character of a victim in an alleged offence of gang rape may not be a ground to reject her evidence, otherwise her evidence is acceptable. To get over such improbabilities of the evidence of PW1, the trial court has relied on a decision of the Apex Court reported in Jai Shree Yadav V. State of U.P. (2005(1) KLT 5). The facts and circumstances of the above case are different in the facts and circumstances of the case in hand. PW1 is a house wife of 35 years of age. She had given birth to nine children through her two husbands. She admitted that there were criminal cases against her and her son. It is relevant to note that when she was examined, she stated that when she reached near the wall, she lost her consciousness and that stage continued till she returned to her house. During cross-examination she stated that she had no tears and she was not in a position to speak and identify the shop keepers or persons. She stated that she could not express the miseries that she had suffered.

PW19 had noted certain tenderness on the upper chest and inter scapular region. PW1 had a definite case that she had brutally attacked by accused No.3 at the slaughter house with a dangerous stick. If that be so, there is possibility of external injuries on the body of PW1. In this context, the trial court had noted that PW1 was a lady who gave birth to nine children. Admittedly, PW1 has no case that she had made any resistance at the time of rape by the accused one after another. It is the admitted case of PW1 that she was brought back to her house in an autorickshaw in which PW4 accompanied. But she had not stated anything to him. Apart from the above, the delay occurred in filing the complaint before the police would create doubt regarding her evidence. There is no explanation for the delay in filing the complaint either from PW1 or from the official witnesses who had investigated the case. Contradictions and additions in Ext.P1 were marked as Exts.D1 to D3. PW1 had admitted that she had taken bath 10 to 20 times on the next day and kept quiet till accused 3 and 4 came to her house.

11. Evidence of PW13 Chemical Examiner and Ext.P17 chemical analysis certificate issued by him would show that human blood, human semen and spermeto zoa were detected in the vaginal smear slides under item Nos.1(A) and 1(B) and semen and spermeto zoa were detected in the vaginal swab under item Nos.2(I) and 2(II) and human blood was detected under item Nos.2(I) and 2(II). These evidence would not show that PW1 was subjected to forcible sexual intercourse. In this context, the defence had a definite case that the presence of human semen and spermeto zoa on the vaginal would not prove any case of forcible intercourse. The evidence of PW19 would not show that there was any violence or injury on the body of PW1. Apart from that no D.N.A. test has been conducted from blood stains and seminal stains to identify the accused. The trial court has committed serious error in finding that there was no possibility of any external injuries on the private parts of PW1 including vagina. The trial court has justified the above finding by holding that PW1 was a lady who gave birth to nine children. Only on the ground that PW1 was involved in some criminal cases, it may not be a ground to reject her

evidence. However, her evidence had to be subjected to strict scrutiny before its acceptance. In this context, a decision of the Apex Court reported in Sudhamani Sekhar Sahoo V. State of Orissa (AIR 2003 SC 2136) is relied on by the learned counsel for the appellants. In the above decision in paragraph 17 the Apex Court held as follows:-

> "17. It is well settled that in rape cases the conviction can be solely based on the evidence of the victim provided such evidence inspires confidence in the mind to the court. The victim is not treated as accomplice, but could only be characterized as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and there is any supporting material likely to be available , then the rule of prudence requires that evidence of the victim maybe supported by such corroborative material."

In the above decision the Apex Court also held as follows:-

> "... The sexual violence is a dehumanising act and it is an unlawful encroachment into the right to privacy and sanctity of woman. The Courts also should be strict and vigilant to protect the society from such evils. It is in the interest of the society that serious crimes like rape should be effectively investigated. It is equally important that there must be fairness to all sides. In a criminal case, the Court has to consider the trangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public."

The the learned counsel for the appellants also relies another decision of the Apex Court reported in Vimal Suresh Kamble V. Chaluverapinake Apad S.P. And another (AIR 2003 SC 818). In the above decision the Apex Court held that a conviction could not be safely based upon the evidence of the prosecutrix alone. It is also held that it is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. In this context the evidence of PW23 investigating officer also has to be considered. PW23 had stated that he had seized MO1 series clothes worn by PW1 at the time of alleged offence. PW23 had not noted any semen or spermeto zoa in MO1 series. Even if MO1 series contained any semen or spermeto zoa, that by itself will not prove that PW1 was subjected to forcible intercourse. The learned counsel for the appellants further relies on a decision of the Apex Court reported in Pratap Misra and others V. State of Orissa (AIR 1977 SC 1307) wherein the Apex Court considered a similar fact situation of a gang rape. In the above decision the Apex

Court held that absence of any injuries either on the accused or the prosecutrix clearly showed that she did not put up any resistance to the alleged rape committed by the accused. Coupled with the above, the delay caused in reported the matter to the police also create doubt regarding the evidence of PW1. In State of Karnataka V. Mappilla the learned Public Prosecutor Soopi ((2003) 8 scc 202) the Apex Court held that undue delay in lodging the complaint without acceptable evidence had also contributed to the doubt in the prosecution case.

12. One more aspect to be considered in this case is that though prosecution examined Pws.3 and 4 to support the evidence of PW1, these witnesses were turned hostile to the prosecution. The prosecution also relied on Ext.P3 statement of PW3 recorded by PW17 under section 164 Cr.P.C., but PW3 had not admitted that he had given any such statement to the police. In his evidence he stated that he was compelled and forced to give the statement due to the threatening on the part of the police and according to him he was kept in the police custody for about 12 days. In this context, PW4 is an independent witness who was examined to prove the occurrence, but he has not

supported the evidence of PW1. The investigation conducted by PW23 is also not trustworthy as this witness had not taken any steps to collect true and correct version of the witnesses. PW23 had stated that he took up the investigation of the case and recover MO1 series . The evidence of PW23 or the alleged owners of the autorickshaws would not prove that PW1 was taken to the place of the incident either by force or against her wish.

13. In the circumstances, this Court is of the view that the prosecution has failed to prove the charges against the appellants beyond reasonable doubt. Hence, the appellants are certainly entitled to the benefit of doubt. Therefore, the conviction and sentence awarded against the appellants are hereby set aside and the appellants are acquitted of all the charges framed against them. The appellant in Crl.A.No.109/2006 shall be released forthwith unless required in any other case. The bail bonds furnished by the appellants except the appellant in Crl.A.No.109/2006 are cancelled.

The appeals are allowed as above.

20th November,2007 **K. Thankappan,**
Judge.

mn

K.Thankappan, J.

Crl.A.Nos.583,598/05
&
109/2006

Judgement

20-11-2007